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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA,)
11)
12 Plaintiff(s),) No. CR 97-0239 MJJ (BZ)
13)
14 v.) **REPORT AND RECOMMENDATION TO**
15) **DENY DEFENDANTS' MOTIONS FOR**
16) **ATTORNEYS' FEES**
17 CURTIS DEBORD and PETER)
18 TRAN,)
19 Defendant(s).)
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23 By order dated May 4, 2006, the Honorable Martin J.
24 Jenkins referred to me for a report and recommendation
25 defendants' amended petitions for reimbursement of costs and
26 attorneys' fees.¹ Defendants Debord and Tran seek costs and
27 attorneys' fees pursuant to 18 U.S.C. § 3006A,² the Hyde
28

29 ¹ Defendant Debord filed an amended petition for
30 reimbursement of costs and attorney fees on May 3, 2006.
31 [docket # 285] Defendant Tran filed a renewed petition for
32 reimbursement of costs and attorney fees on May 4, 2006.
33 [docket # 288]

34 ² See 18 U.S.C. § 3006A, statutory note, Pub. L. No.
35 105-119, § 617, 111 Stat. 2440, 2519 (1997). The Hyde
36 Amendment provides that an award of reasonable attorneys' fees
37 shall be granted to a prevailing criminal defendant, pursuant
38 to the Equal Access to Justice Act, 28 U.S.C. § 2412 (the
39 "EAJA"), if such defendant establishes that the government's

1 Amendment, contending that the prosecution was vexatious,
2 frivolous and in bad faith.

3 On August 9, 2006, at oral argument, counsel for Mr.
4 Debord represented that prior counsel, Mr. Daar, had
5 mistakenly submitted a Hyde Amendment application on behalf of
6 Mr. Tran and Mr. Debord. Mr. Tran, who participated
7 telephonically, stated that he was trying to retain counsel
8 for his own Hyde Amendment application. Mr. Tran's
9 application for fees and expenses presents different issues
10 from Mr. Debord's application since the court appointed
11 counsel for Mr. Tran in the underlying case. I granted Mr.
12 Tran until August 30, 2006 to submit his request for his fees
13 and expenses and scheduled a hearing on Mr. Tran's application
14 for September 13, 2006, which was continued until September
15 29, 2006, at his request to allow his new attorney time to
16 become familiar with the case and to submit supplemental
17 documents in support of his application.³ I ordered Mr. Tran
18 to file any reply by September 26, 2006, which he failed to
19 do.

20 Defendants did not explain the factual bases for the
21 prosecution or their motions in their moving papers. Some of
22 the material facts are in Judge Smith's June 28, 2005 order
23 dismissing the indictment. At oral argument, Mr. Debord's

24 _____
25 prosecution was vexatious, frivolous, or in bad faith.

26 ³ On September 13, 2006, Mr. Tran's counsel submitted a
27 Brief Setting Forth the Facts, Details, History, etc. of the
28 Conduct upon Which Defendant Peter Tran's Claim for
Reimbursement Is Based. [docket # 313] The brief, an unsworn
document, largely reiterates facts discussed at the August 9,
2006 hearing.

1 counsel supplied additional facts. Although these additional
2 facts are not evident in the record, I recommend they be
3 relied on since the government did not contradict them.

4 On August 12, 1997, defendants were indicted for crimes
5 relating to the illegal importation of weapons, weapons parts
6 and other munitions. They were charged with conspiracy,
7 smuggling, making false statements, violating the Arms Export
8 Control Act and dealing in firearms without a license. On
9 November 17, 1998, a superseding indictment was filed and
10 November 29, 2001 a second superseding indictment was filed.⁴
11 Defendants pled not guilty to all charges in both superseding
12 indictments.

13 The charges alleged against defendants focused on two
14 shipments: 1) three containers from Vietnam delivered in the
15 spring of 1996 to Mr. Debord's warehouse in Roseville,
16 California (the "Roseville Containers") and 2) two containers
17 shipped via Long Beach, California in January of 1997,
18 destined for Mexico (the "San Diego Containers"). The
19 Roseville Containers were labeled as containing machine tools,
20 and Mr. Debord contends they contained machine tools, rags and
21 other legal items. According to the government, the San Diego
22 Containers were shipped under bills of lading and manifests
23 that falsely described the contents of the containers as
24 sewing machine parts and machine tools but instead held
25 weapons parts.

26 Based on its undercover investigation and information

27 ⁴ The superseding indictments added a witness tampering
28 charge.

1 from third parties, including from a company called Northridge
2 International, Inc. ("Northridge"), which had purchased some
3 weapons parts from Mr. Debord, in early 1997, the government
4 obtained a warrant to search Mr. Debord's warehouse in
5 Roseville for weapons parts and munitions illegally
6 transported from Vietnam. The Roseville Containers had been
7 unpacked by this time. Seeing a cache of weapons parts, the
8 government agents assumed these parts had arrived in the
9 Roseville Containers and seized them (the "Roseville weapons
10 parts").

11 Believing that the weapons parts seized from Northridge
12 were a subset of the Roseville weapons parts, the government
13 traced the serial numbers on the weapons parts from Northridge
14 (the "Northridge Receivers") through a database which recorded
15 serial numbers whenever the military transported weapons parts
16 internationally.⁵ The government discovered that the database
17 listed the traced Northridge Receivers as never having left
18

19 ⁵ Tracing these weapons parts to Vietnam through their
20 serial numbers is essential for the Vietnam Munitions Act
21 claim. 22 U.S.C. § 2778. At all times outlined in the
22 indictment, Vietnam was listed on the U.S. Munitions List, and
23 importing defense articles and services from Vietnam was
24 prohibited. Nesbitt Decl. ¶ 4. A Vietnam connection is not
25 essential to any of the other charges; none of the other
26 charges is country-specific. There is little in the record or
27 defendants' petitions to explain how the tracing works, but as
28 best as I can understand it from the explanations proffered
during oral argument, the government maintains a database of
serial numbers of weapons it shipped abroad, including Vietnam.
Any weapons on the list found in the U.S. would arguably have
been imported in violation of the law. However, just because
the military did not ship a weapon outside of the U.S. does not
mean that the weapon could not have been shipped out of the
U.S. by someone else and then smuggled back into the country.
The answers the court received to questions about how this
database worked were not particularly helpful.

1 the country, much less been in Vietnam.⁶ The government did
2 not attempt to trace the serial numbers on the weapons parts
3 seized from the Roseville warehouse until sometime after new
4 counsel entered for the prosecution in November 2001.

5 At or about the same time as the Roseville Containers and
6 weapons parts were seized, customs officials opened the San
7 Diego Containers which were labeled sewing machine parts and
8 machine tools, and seeing weapons parts instead, seized the
9 containers and their contents. The U.S. Department of Fines,
10 Penalties and Forfeiture (the "Forfeiture Department") held
11 the San Diego Containers and their contents until September
12 28, 1999. Without written authorization from the San
13 Francisco U.S. Attorney's Office (the "U.S. Attorney's
14 Office") to continue to retain this second shipment, the
15 Forfeiture Department destroyed it. The U.S. Attorney's
16 Office learned of the destruction in March 2001 but did not
17 inform defense counsel until June 2001.

18 The government then attempted to trace the serial numbers
19 of the weapons parts seized. Since it no longer had the
20 weapons parts from the San Diego Containers, it focused on the
21 weapons parts found in Mr. Debord's Roseville warehouse.
22 Because of a fire in 1974 at a government record center, many
23 of the serial numbers for these weapons parts were
24 untraceable. Of the handful that could be traced, the results

25 ⁶ The record is not very clear as to when the
26 government performed this search, and the government was
27 unwilling to accept Mr. Dinan's representation that the
28 government knew in 1997 that at least some of the weapons
seized in Roseville had not been shipped by the military to
Vietnam.

1 showed that the military had never shipped these outside the
2 U.S. On November 6, 2002, the government dismissed most of
3 the counts related to the Roseville Containers.

4 After several motions, hearings and conferences, Judge
5 Smith held an evidentiary hearing addressing defendants'
6 motion to dismiss on March 21 and 22, 2005 and June 13 and 14,
7 2005 and ordered the second superseding indictment be
8 dismissed on June 28, 2005. In her order, Judge Smith
9 detailed the government's numerous mistakes. She found that
10 the failure of the prosecutor at the time, Mr. Schaefer, to
11 return telephone calls and messages had led in part to the
12 government's grossly negligent destruction of the evidence.
13 She also found that the government's ongoing failure to comply
14 with discovery rules and court orders was part of its overall
15 neglect in handling the case. Because the government was more
16 to blame than defendants in causing the unnecessary delay to
17 bring the case to trial, thereby violating defendants' rights
18 to a speedy trial under the Constitution, Judge Smith
19 dismissed the case. This motion for attorneys' fees under the
20 Hyde Amendment followed. Mr. Debord claims he spent over \$1.1
21 million in defending himself; he is requesting reimbursement
22 for \$871,766.69 of his fees and expenses. Mr. Tran is
23 requesting reimbursement for \$52,500 of his fees and expenses.

24 The Hyde Amendment was enacted to sanction the government
25 for prosecutorial misconduct. To recover attorneys' fees and
26 costs under the Hyde Amendment, as a threshold matter, each
27 defendant must show that the case against him was pending on
28 or after the enactment of the Hyde Amendment, his net worth is

1 less than \$2 million, he was the prevailing party in a
2 criminal prosecution, he was not represented by assigned
3 counsel paid for by the public, his attorney's fees were
4 reasonable and no special circumstances exist to make the
5 award unjust. U.S. v. Braunstein, 281 F.3d 982, 994 n.9 (9th
6 Cir. 2002).

7 Once defendants establish that they satisfy these
8 threshold requirements, they must still satisfy the standard
9 for reimbursement under the Hyde Amendment, which has a more
10 demanding burden of proof than the EAJA. Defendants are
11 entitled to their fees and costs under the Hyde Amendment only
12 if they can show the government's position was vexatious,
13 frivolous or in bad faith. U.S. v. Manchester Farming
14 Partnership, 315 F.3d 1176, 1182 (9th Cir. 2003). The Ninth
15 Circuit has defined those terms as follows:

16 "Vexatious" has both a subjective and objective
17 element: subjectively, the [g]overnment must have
18 acted maliciously or with an intent to harass
19 [defendants]; objectively, the suit must be
20 deficient or without merit. To prove
21 vexatiousness, [defendants] must show the
22 [g]overnment had some "ill intent." Id.

23 A "frivolous" case is one that is "groundless ...
24 with little prospect of success; often brought to
25 embarrass or annoy [defendants]." The case is
26 frivolous when "the government's position was
27 foreclosed by binding precedent or so obviously
28 wrong as to be frivolous." Id. at 1183.

29 "[B]ad faith" "is not simply bad judgment or
30 negligence, but rather it implies the conscious
31 doing of a wrong because of dishonest purpose or
32 moral obliquity; ... it contemplates a state of
33 mind affirmatively operating with furtive design
34 or ill will." Id. at 1185.

35 Since the Hyde Amendment incorporates provisions of the
36 EAJA, courts have applied 28 U.S.C. § 2412 in determining

1 procedures and limitations. U.S. v. Sherburne, 249 F.3d 1121,
2 1129 (9th Cir. 2001) ("The Hyde Amendment provides that 'awards
3 [of attorney's fees] shall be granted pursuant to the
4 procedures and limitations (but not the burden of proof)
5 provided for an award under section 2412 of title 28, United
6 States Code [the EAJA].'"). That section authorizes a court
7 to award "reasonable fees and expenses of attorneys" and
8 requires that a Hyde Amendment application "includ[e] an
9 itemized statement from any attorney or expert witness
10 representing or appearing in behalf of the party stating the
11 actual time expended and the rate at which fees and other
12 expenses were computed." 28 U.S.C. § 2412(b), (d)(1)(B).
13 Courts cap rates for attorneys' fees awarded under the Hyde
14 Amendment at \$125 per hour. Sherburne, 249 F.3d at 1129
15 (applying the EAJA cap of \$125 and not the Criminal Justice
16 Act cap of \$75).

17 Mr. Tran has failed to satisfy the threshold requirements
18 of the Hyde Amendment, since an attorney appointed under the
19 Criminal Justice Act represented him in the underlying action.
20 He requests \$30,000 in attorneys' fees but does not detail
21 this amount, stating generally in his moving papers that he
22 has incurred fees for an attorney in a criminal case in
23 Portland, Oregon, "who expended time to review the materials
24 in this case in an effort to reach a global settlement of both
25 cases." Defendant Peter Tran's Renewed Petition, Exh. 1 ¶ 4.
26 [docket # 288] Mr. Tran does not explain why he needed Oregon
27 counsel in addition to his appointed counsel. He does not
28 cite any authority to support the proposition that he should

1 be reimbursed fees for an attorney hired in another case in
2 another state.⁷ Since assigned counsel paid for by the public
3 represented Mr. Tran in the underlying case, which is the
4 basis for his Hyde Amendment petition for attorneys' fees and
5 costs, for this reason alone, I recommend that Mr. Tran's
6 petition be denied for failure to satisfy the threshold
7 requirements.⁸

8 On his motion for attorneys' fees and costs, Mr. Debord
9 was represented by Mr. Dinan and Mr. Kapland, who did not
10 defend him in the underlying action.⁹ Claiming that the
11 deadline for filing an application, May 4, 2006, did not give
12 him enough time to complete the itemized list of expenses and
13 attorneys' fees to support his request, Mr. Debord requested
14 leave to supplement his application. The court granted
15 defendants leave to file supplemental documents.¹⁰ The only
16 supplemental documents the court received by June 5, 2006 were
17 a summary list of expenses and an affidavit of Mr. Kapland

19 ⁷ Mr. Tran has supplied no information from which I
20 could tell to what extent Oregon counsel was involved in this
21 case, but this case and the case in Oregon were not so related
as to require Mr. Tran's appointed counsel in this case to
represent him in the Oregon case.

22 ⁸ Even if he could satisfy the threshold requirements
23 under the Hyde Amendment, Mr. Tran's application for attorneys'
24 fees and costs suffers from the same failures as Mr. Debord's
application.

25 ⁹ Mr. Debord has since written Mr. Dinan and Mr.
Kapland seeking to terminate their representation.

26 ¹⁰ Defendants first submitted a petition for
27 reimbursement of costs and attorneys' fees on December 5, 2002,
28 so they have known they were going to request their fees and
would have to comply with the requirements of the Hyde
Amendment for some time.

1 with attached letter and spreadsheet of expenses for Mr.
2 DeBord. [docket # 293] In his reply, Mr. Debord attached
3 more spreadsheets of attorneys' fees and expenses. Reply,
4 Exh. A. [docket # 300] At oral argument, Mr. Debord also
5 submitted a stack of invoices and receipts to support his
6 summaries.¹¹ Mr. Debord's stack of his receipts and invoices
7 does not include any bills of his attorneys or any statements
8 as to why his attorneys should be reimbursed and why he
9 incurred such expenses. Mr. Tran similarly failed to submit
10 any invoices or receipts to support his requested fee and cost
11 amounts.

12 Aside from the threshold matters which defeat Mr. Tran's
13 application, on the merits, neither his nor Mr. Debord's
14 petition satisfies the requirements of the Hyde Amendment.
15 Defendants have not shown that their fees are reasonable. The
16 spreadsheets included in Mr. Debord's supplemental papers are
17 wholly inadequate to serve as a basis for awarding fees.
18 Those spreadsheets merely list the yearly totals of attorneys'
19 fees from 1997 through 2006. There is no explanation of these
20 amounts. Mr. Debord's attorneys' fees listed in the
21 spreadsheets included in the reply are divided by general
22 group, with dates and amounts. Seventeen timekeepers are
23 listed, with no differentiation between attorneys or court
24 reporters or investigators. There is no explanation why Mr.

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26 ¹¹ Because the government had not had an opportunity to
27 review these invoices and receipts, the court granted leave for
28 the government to file objections, which it did on August 16,
2006. The government raises a number of valid points, and its
objections are **SUSTAINED**.

1 Debord hired so many attorneys. The entries are vague, with
2 either an entire firm or an individual listed next to a date
3 and a dollar amount. For instance, Mr. Debord requests
4 \$173,874.15 in fees for Chris Mancini, who was an attorney in
5 the underlying case. On November 26, 2001, next to his name
6 is an amount for \$14,000, but it is not clear what that amount
7 covers, how many hours he spent on what tasks or even whether
8 he actually billed that amount. Other timekeepers include
9 entities such as the Law Offices of Edwin Marger, for which an
10 amount of \$55,000 for January 16, 2004 is claimed with no
11 information about what that office did, who did it, who
12 performed the task or how many hours were spent. This makes
13 it impossible for me to make any evaluation of whether the
14 fees and hours claimed are reasonable or to multiply any hours
15 by the \$125 hourly rate allowed by the courts.¹²

16 On August 28, 2006, with leave of court, Mr. Tran filed
17 supplemental documents with a partial itemized list of
18 expenses and attorneys' fees totaling \$52,500. [docket # 307]
19 The expenses from 1997 to 2006 were for "Air Travel/Taxi/Car
20 Rental/Hotel" in the amount of \$20,000, "Investigator fees" in
21 the amount of \$2,500 and "Attorneys fees" in the amount of
22 \$30,000. Mr. Tran has not submitted any receipts or invoices.
23 I do not know whether his fees request reflects the work of a

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25 ¹² I realize that some criminal defense lawyers may not
26 keep contemporaneous time records of the sort that civil
27 lawyers keep and upon which courts rely in awarding fees in
28 civil cases. However, no attorney in this case for whom fees
are sought has stated that he does not maintain contemporaneous
time records and no attorney who does not have such records has
made any effort to describe or allocate the work done or the
hours spent.

1 single attorney or multiple timekeepers, and he provides no
2 explanation why any of these fees or costs were reasonable.

3 Because defendants have not complied with the
4 documentation requirements of the Hyde Amendment, I recommend
5 their motions be denied.

6 Even if defendants had submitted adequate documentation,
7 I would still recommend that their requests for attorneys'
8 fees be denied because defendants have not satisfied their
9 burden under the Hyde Amendment. Neither Mr. Tran nor Mr.
10 Debord specifies under which standard they are requesting
11 their attorneys' fees, but I conclude that they have not shown
12 they are entitled to fees under any of the three standards.

13 Defendants bear the burden of proving that the
14 government's position was vexatious, frivolous or in bad
15 faith. U.S. v. Lindberg, 220 F.3d 1120, 1124 (9th Cir.
16 2000)("the Hyde Amendment places the burden of proof on the
17 movant"). In this case, defendants rely almost exclusively on
18 the fact that the government should have known that at least
19 some of the weapons parts did not originate from Vietnam and
20 so should not have brought charges against defendants, that
21 the government was delinquent in responding to discovery
22 requests and that the government destroyed some evidence and
23 yet still continued to prosecute defendants when it should
24 have dismissed all the charges.

25 Defendants' arguments fail. They have not made any
26 showing of the type of baseless claim or ill will required to
27 receive fees under the Hyde Amendment. First, the government
28 was not vexatious, frivolous or in bad faith in bringing

1 charges against defendants as to the San Diego Containers. At
2 oral argument, Mr. Debord argued that these containers were
3 never meant to be in the U.S. and that they were mislabeled to
4 prevent theft, but the fact remains that they did enter the
5 U.S. and when the customs agents opened containers labeled as
6 sewing machine parts and tools and found instead weapons
7 parts, they had reason to seize them and the government had
8 reason to bring charges against defendants.¹³ Confidential
9 informants and third parties corroborated that Mr. Debord had
10 weapons in Vietnam and was smuggling weapons from Vietnam into
11 the U.S. U.S.' Memo. of Law upon Completion of Evidentiary
12 Hearing on Destruction of Evidence ("U.S. Memo") 2:4-19.
13 [docket # 260] At the time the government brought the
14 charges, there was ample evidence to support a case against
15 defendants as to the San Diego Containers.

16 The Roseville Containers present a more difficult
17 question since the government had no direct evidence that the
18 weapons parts it seized had entered the country in the
19 Roseville Containers. The government did have evidence from
20 its undercover investigation and from third parties, and it
21 could assume, based on the weapons parts seized from the San
22 Diego Containers, that defendants were involved in a
23 conspiracy to import weapons parts illegally and that the
24 empty Roseville Containers shipped from Vietnam had contained
25 the weapons parts seized from Mr. Debord's warehouse. The

26 ¹³ Mr. Tran also argues that the containers were not
27 mislabeled, since "hammers" are firearms parts, and any
28 incorrect labeling, such as sewing machine parts, was an honest
mistake. Tran suppl. brief ¶¶ 21-24. [docket # 313]

1 difficulty is that from the beginning, the government had the
2 ability to trace the serial numbers on the weapons parts
3 seized from the Roseville warehouse and had the government
4 traced the serial numbers of those weapons parts in 1997, it
5 would have learned that the military had never shipped these
6 parts outside of the country. Defendants claim that when the
7 government did finally trace the weapons parts and discovered
8 that those which were traceable had not been shipped outside
9 the U.S., it should have dismissed the charges immediately.
10 The government asserts that soon after Mr. Nesbitt, the
11 prosecutor who replaced Mr. Schaefer, became aware of the
12 results of the trace, he dismissed the charges based on the
13 Roseville Containers. On November 6, 2002, the government did
14 dismiss most of the counts related to the Roseville
15 Containers.

16 That the government exercised bad judgment or was
17 negligent in failing to fully investigate the origin of the
18 Roseville weapons parts is clear, but the government did not
19 act with the requisite ill intent for defendants to receive
20 their fees under the Hyde Amendment. Even had I concluded
21 that defendants were entitled to some fees with respect to
22 the Roseville weapons parts charges, their failure to
23 properly document their fees would have prevented me from
24 making any such allocation.

25 As for the destruction of the San Diego weapons parts
26 and the government's continued prosecution with respect to
27 these, I agree with Judge Smith that the government did not
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1 act in bad faith.¹⁴ The prosecution did not find out about
2 the destruction until March 2001, and they informed defense
3 counsel in July 2001.

4 While the destruction of the weapons parts in the San
5 Diego Containers may have made it more difficult for the
6 government to prove its case, it still appears to have had
7 sufficient evidence from which it could have obtained a
8 conviction on some or all of the charges based on the San
9 Diego Containers had the evidence been accepted by a jury.
10 The government pursued the remaining charges as to the San
11 Diego Containers because "despite the destruction of the
12 evidence, the fact that the shipping containers originated in
13 Vietnam has been preserved, the contents of the shipping
14 containers has been preserved, how the weapons parts looked
15 has been preserved." U.S. Memo 8:4-8. The government
16 believed it could continue its prosecution based on this
17 evidence.

18 Finally, Judge Smith ultimately dismissed the case, not
19 on the merits, but because she found that the government had
20 acted with unnecessary delay, thereby denying defendants
21 their right to a speedy trial. She did not address the
22 government's charges, nor did she assess defendants' guilt or
23 innocence. Instead, she analyzed the case under Federal Rule
24 of Criminal Procedure 48(b), looking only to the factors
25

26 ¹⁴ The bad faith standard under the Hyde Amendment may
27 be different from the bad faith standard under Federal Rule of
28 Criminal Procedure 48(b), as Mr. Debord claims, but the
standards are similar enough that I recommend that Judge
Smith's finding of no bad faith be given some deference.

1 whether the government had been fairly forewarned as to the
2 consequences of further delay, whether there was
3 prosecutorial misconduct related to the unnecessary delay and
4 whether there was prejudice due to the unnecessary delay.
5 Within the context of the unnecessary delay, Judge Smith
6 described the government's conduct as both "purposeful and
7 oppressive" because of the government's "intentional
8 destruction of material evidence," but she found, after
9 carefully weighing the evidence and arguments made over four
10 days at the evidentiary hearing, that while the government
11 may have been grossly negligent, it did not act in bad faith
12 in destroying the San Diego weapons parts.¹⁵

13 Defendants do not contest that they were involved in
14 shipping at least two mislabeled containers of weapons parts.
15 They do not deny charges of smuggling, 18 U.S.C. § 545,
16 conspiracy to commit offense or defraud the U.S., 18 U.S.C. §
17 371, false statements, 18 U.S.C. § 1001, or unlawful
18 importing of firearms without a license. 18 U.S.C. § 922 and
19 22 U.S.C. § 2778.¹⁶ They contend that the government should
20 have diligently unearthed all evidence that could have helped
21 the defense and that once it destroyed the weapons parts in

22
23 ¹⁵ While the government's delay in prosecuting the case
24 resulted in Judge Smith's order dismissing the indictment,
25 defense counsel also seem to have contributed to the delay in
26 bringing the case to trial. During the evidentiary hearing, on
June 14, 2005, Judge Smith attributed some of the delay to the
lack of assertiveness of defense counsel. See Def't Peter
Tran's Renewed Petition for Reimbursement of Costs and Attorney
Fees, Exh. 2. [docket # 288]

27 ¹⁶ There is no suggestion in the defense papers that the
28 witness tampering charge was vexatious, frivolous or in bad
faith.

1 the San Diego Containers, it did not have evidence to
2 continue to prosecute. However, mislabeling shipping weapons
3 parts as sewing machine parts and failing to declare or
4 transport them properly are still crimes.

5 The fact that the court had to issue an order to show
6 cause because of the government's failure to provide
7 defendants with requested discovery shows that "the
8 [g]overnment's performance was significantly below desirable
9 standards" but it does not rise to the level of
10 vexatiousness, frivolous conduct or bad faith required under
11 the Hyde Amendment. Manchester Farming, 315 F.3d at 1183 and
12 1186 n.25 ("'[t]he government's failure to comply with
13 repeated court orders for discovery indicates a lack of
14 respect for orders of the court'; however, the government's
15 position was not 'vexatious, frivolous or in bad faith'").

16 Therefore, I cannot conclude that the government's suit
17 was so deficient, meritless or wrong as to be vexatious or
18 frivolous, and I do not find that the government acted with
19 the ill intent or ill will required for its prosecution to be
20 vexatious or in bad faith.

21 Because defendants' documentation for their attorneys'
22 fees request is inadequate and because they have not shown
23 that the government's position was vexatious, frivolous or in
24 bad faith, I recommend that their applications for attorneys'
25 fees and expenses under the Hyde Amendment be denied. As to
26 Mr. Tran, his application should be denied for the additional
27 reason that he has failed to satisfy the threshold
28 requirements of the Hyde Amendment. I find no need for

1 further argument, so the hearing scheduled for September 29,
2 2006 is **VACATED**.

3 Dated: September 27, 2006

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Bernard Zimmerman
United States Magistrate Judge

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